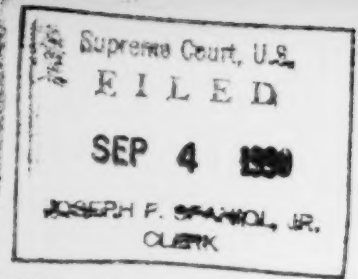


90-419<sup>①</sup>



NO. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**

October Term, 1990

JOHN DOE,

*Petitioner,*

v.

BOROUGH OF CLIFTON HEIGHTS, *et al.*,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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September 5, 1990

### QUESTIONS PRESENTED

1. Whether 42 U.S.C. Section 1983, which creates a right of action against "any person" who deprives another or causes another to be deprived of his rights under federal law, makes violations of private rights under a federal funding statute actionable only against recipients of federal funds under that statute.

2. Whether qualified immunity is available in a suit under Section 1983 to those who violate established state and federal statutory law, simply because they did not think that they would subsequently be held liable for damages under Section 1983.

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1990

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No. \_\_\_\_\_

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JOHN DOE,  
Petitioner,

v.

BOROUGH OF CLIFTON HEIGHTS, ET AL.,  
Respondents.

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

The petitioner John Doe respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in favor of respondents the Borough of Clifton Heights, Robert Keates, Officer Zimath, Richard Roes #1, the Delaware County Prison, the Delaware County Prison

Board, Kenneth Matty, David W. Jones, and Richard Roes #2, entered in this proceeding on April 13, 1990.

#### OPINION BELOW

The order of the Court of Appeals, not yet reported, appears in the Appendix hereto at A-12. The opinion of the District Court for the Eastern District of Pennsylvania, reported at 719 F. Supp. 382, appears in the Appendix hereto at A-1.

#### JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on April 13, 1990. A timely petition for rehearing and for rehearing en banc was denied on June 7, 1990, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section

1254(1). The jurisdiction of the courts below was invoked pursuant to 28 U.S.C. Sections 1291, 1294, 1331, 1343 & 2201.

### QUESTIONS PRESENTED

1. Whether 42 U.S.C. Section 1983, which creates a right of action against "any person" who deprives another or causes another to be deprived of his rights under federal law, makes violations of private rights under a federal funding statute actionable only against recipients of federal funds under that statute.

2. Whether qualified immunity is available in a suit under Section 1983 to those who violate established state and federal statutory law, simply because they did not think that they would subsequently be held liable for damages under Section 1983.

## STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue in this case are United States Code, Title 42, Sections 1983 and 5633. The text of the relevant portion of these provisions are set out in the Appendix at A-16.

## STATEMENT OF THE CASE

This case is a civil rights action for damages brought by Petitioner against individual police officers and the Borough of Clifton Heights, Pennsylvania, as well as individual prison officials and the governing authority of the Delaware County (Pennsylvania) Prison.

The crucial facts as this matter comes before this Court are not in dispute: First, that the plaintiff in this civil rights action was a juvenile at the time of the events in question.

Second, that he was sent to an adult prison, where he was celled with adult offenders. And third, that state and federal law both prohibit incarcerating a juvenile in an adult facility and celling him with adults.

John Doe, now a young adult, was a 17-year-old when, on the night of November 14, 1987, he was arrested by police officers Keates and Zimath in Clifton Heights, a Philadelphia suburb, joy-riding in a stolen car. In the ensuing hours, Keates, Zimath, and other police officers simply denied the truth that this young man was a juvenile, see, e.g., Depo. Tr. of Keates at 11-12, 27-28, despite his assertions being backed by an identification card showing him to be a juvenile, see id., Exh. 1, and positive verification of his age and identity by a member of his own family. See Depo. Tr. of Arthur Oliver at 21-27.

Instead, they had him committed to the local adult prison.

Officials at the Delaware County Prison denied that they had authority to refuse to receive and house John Doe despite his age. No attempt to verify his age -- or any of his background information -- was made except via standard state criminal history background check, which took on average one week. See Depo. Tr. of prison officer Pelliriti at 57, 63, 65; Depo. Tr. of prison officer Farina at 92. Instead, the prison's policy allowed juveniles wrongfully detained at the prison to prove their age only by telephoning family members who could then produce a birth certificate. See Depo. Tr. of Pelliriti at 60-61; Depo. Tr. of Farina at 103-06, 125-29. Such phone calls were only available, however, during approximately the first hour after

a prisoner arrived at the Intake Unit, and during sessions with prison counsellors. See Depo. Tr. of Pellirit at 64. Thus, Petitioner was afforded no opportunity to reach his family and obtain a birth certificate to prove his age to the prison's satisfaction, from being locked up at approximately noon on Saturday until his counseling session almost 48 hours later. Id.

Neither was any attempt made to segregate John Doe from adults, pending his identification as an adult or a juvenile: At the time, there was no policy of celling juveniles, or individuals who claimed to be juveniles, separately from adults at Delaware County Prison. See Depo. Tr. of Farina at 123. John Doe was thus celled with five serious adult offenders with extensive records, on a row of cells housing many other, similar adult prisoners. Within

2-1/2 months after this incident, however, a policy was instituted in the intake unit segregating juveniles. See Memorandum dated 1-28-88 from Gene Farina to Deputy Warden Walrath, App. on Appeal at 36.

John Doe spent two nights in the prison. He alleges (and this the respondents dispute) that he was sexually assaulted on the second. Doe asserts that the rapist entered and escaped from his cell through the unlocked door, during the late-night medical exams administered to new arrivals. See Depo. Tr. of Petitioner at 41-48 & Exh. 1. New commitments were removed from their cells for such exams and brought downstairs between approximately 1:00 and 2:00 a.m. each night; unmonitored access between cells was possible during that hour. See, e.g., Answers of Delaware County

Prison Defendants to Interrogatories,

para. 10, App. on Appeal at 63.

John Doe was finally transferred to a nearby juvenile facility, and eventually released on six-months probation, which expired without further incident.

On November 8, 1988, Doe filed this civil rights action in the United States District Court for the Eastern District of Pennsylvania, claiming damages from an unlawful and unconstitutional commitment as a juvenile to an adult prison facility and celling amongst adult prisoners, and from a sexual assault resulting therefrom.

On defendants' motions for summary judgment and plaintiff's cross-motion for partial summary judgment, the district court granted summary judgment for all defendants and against the plaintiff. The court issued a memorandum opinion.

This opinion was upheld by the Court of Appeals in a judgment order. Rehearing and rehearing en banc were denied, and leave to file an extraordinary petition for rehearing and rehearing en banc, in light of an opinion of this Court delivered the day before issuance of the appellate court's mandate in this matter, was also denied. This petition follows.

## REASONS FOR GRANTING THE WRIT

Since its decision in Maine v. Thiboutot, 448 U.S. 1 (1980), this Court has faced recurring questions about private rights arising under federal statutes enforceable through the so-called "laws prong" of 42 U.S.C. Section 1983. In the last Term alone, the Court twice tackled this subject. Wilder v. Virginia Hospital Association, 58 U.S.L.W. 4795 (June 14, 1990), and Golden State Transit Corp. v. City of Los Angeles, 493 U.S. \_\_\_\_ (1989).

This case presents a novel and significant question in this area, decided by the courts below in a manner that conflicts with existing precedent. This petition also presents a second question as to the doctrine of qualified immunity that is significant and was decided by the courts below in a manner that conflicts with existing precedent.

1. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF THIS COURT, OF THE THIRD CIRCUIT, AND OF OTHER COURTS OF APPEALS, THAT DEPRIVATION OF A FEDERAL STATUTORY RIGHT IS ACTIONABLE UNDER SECTION 1983 AGAINST ANY PERSON WHO DEPRIVES ANOTHER OF THAT RIGHT.

Petitioner has brought this civil rights action under Section 1983 for violation of his federal statutory rights under the Juvenile Justice and Delinquency Prevention Act and the Juvenile Justice Act. See especially 42 U.S.C. Secs. 5633.

Under these statutes and their accompanying regulations (hereinafter referred to collectively as "JJDP"), Congress has mandated that, in general, States not incarcerate juveniles in the same facility as adults. In the rare instances in which incarceration in the same facility as adults is actually

1  
permitted, juveniles must be kept separate from adults as to both sight and sound. See 42 U.S.C. Secs. 5633(a) (12), (13) & (14). At issue, then, is federal law enacted in large part to protect individuals like Petitioner from precisely the harm that befell him in this case.

The opinion below agreed that under the reasoning of Thiboutot and its progeny, the JJDPa must be read to create a federal right, inuring to individuals such as Petitioner, not to be

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1  
The only situation relevant to this case is that juveniles arrested or taken into custody for committing an act that would be a crime if committed by an adult may be temporarily held for a maximum of six hours in an adult facility for purposes of identification, processing, or transfer to other facilities. See 28 C.F.R. Secs. 31.303 (f)(5)(iv)(G) and (H).

incarcerated in an adult facility or  
amongst adult offenders.<sup>2</sup> The court then  
adopted the novel view that an action  
under Section 1983 for violation of

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The lower courts have split as to whether the JJDPa creates a private right actionable under Section 1983. The court in Doe v. McFaul, 559 F. Supp. 1421 (E.D. Ohio 1984), decided before Wright v. City of Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987), found that the federal provisions at issue here did not create a private right of action. (Wright suggested that perhaps third-party mandates such as that contained in the JJDPa might not be found to create a private right of action under Section 1983.) The McFaul court nonetheless held that incarceration of juveniles in an adult jail did violate the juveniles' constitutional rights.

Henrickson v. Griggs, 672 F. Supp. 1126, 1133-37 (C.D. Iowa 1987), and the opinion below, see Appendix at A7-A8, however, both decided after Wright, held that a private right of action was created under the Juvenile Justice Act and Section 1983. Under Wright, the Henrickson opinion recognized, a court looks merely to the mandatory nature of the defendant's obligation and the clarity of Congress' intent to benefit individuals such as the plaintiff.

Petitioner's rights under a federal statute can only be brought against an offender who is personally the recipient of federal funds under the statute. That holding is contrary to existing precedent and to the plain language of Section 1983, and is dangerous to the continued vindication of all constitutional rights under Section 1983.

The decisions in this case denying John Doe his right to proceed under Section 1983 conflict most clearly with the methodological distinction, between Section 1983 and implied-right-of-action cases, drawn by the Court at the outset of its analysis in Virginia Hospital:

In implied right of action cases, we employ the four-factored Cort [v. Ash, 422 U.S. 66 (1975)] test to determine "whether Congress intended to create the private remedy asserted" for the violation of statutory rights. The test reflects a concern, grounded in separation of powers, that Congress rather than

the courts controls the availability of remedies for violations of statutes. Because Section 1983 provides an "alternative source of express congressional authorization of private suits," these separation of powers concerns are not present in a Section 1983 case. Consistent with this view, we recognize an exception to the general rule that Section 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.

Virginia Hospital, 58 U.S.L.W. at 4798 n.9 (emphasis in original) (citations omitted).

Thus, the lower court's conclusion that "I cannot . . . find that in enacting this statute Congress intended to extend this private right of action to cover suits against individual arresting officers," Appendix at A-9, is entirely inappropos. Its holding that "Congress intended to provide a private right of action only against state and/or local agencies eligible for funding under the Act," id., might arguably be correct as

to a Cort v. Ash implied right of action, but it is utterly inapplicable -- and incorrect -- as to the question of a right of action under Section 1983 against the arresting officers, prison officials, or, for that matter, "any person," see 42 U.S.C. Section 1983, who caused John Doe to be deprived of his rights under the JJDPA.

The holding below is irreconcilable with not only the plain language of Section 1983 but also the Section 1983 principles declared by this Court. Virginia Hospital leaves no doubt as to that:

"We do not lightly conclude that Congress intended to preclude reliance on Section 1983 as a remedy' for the deprivation of a federally secured right." The burden is on the State to show "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." In the absence of such an express provision, we have found private

enforcement foreclosed only when the statute itself created a remedial scheme that is "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under Section 1983."

Virginia Hospital, 58 U.S.L.W. at 4801 (citations omitted). Needless to say, neither the defendants nor any court has cited any "express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement" of the JJDPa, because there is none. Enforcement of JJDPa rights under Section 1983 thus can be denied only if a "sufficiently comprehensive" alternative remedial scheme exists under the JJDPa -- and not simply if the state actor otherwise liable under Section 1983 has not personally received federal funds under the statute.

It is worth assaying briefly just how strongly the Virginia Hospital Court

phrased the requirement of an alternative remedial scheme, as it indicates this Court's great reticence toward denying a "laws prong" right of action under Section 1983. After noting that "[o]n only two occasions have we found a remedial scheme established by Congress sufficient to displace the remedy provided in Section 1983," the Court asserted:

The Medicaid Act contains no comparable provision for private judicial or administrative enforcement. Instead, the Act authorizes the Secretary to withhold approval of plans, [citation omitted], or to curtail federal funds to States whose plans are not in compliance with the Act. . . .

Id. The Court therefore concluded definitively that "[t]his administrative scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of Section 1983." Id.

But that is also essentially the administrative scheme established by the JJDPa.

The JJDPa, moreover, similarly to most federal grant-in-aid programs, does not provide for federal grants to individual police officers or prison guards. The Act provides federal funds to States, on the condition that the State then ensure compliance with the JJDPa's requirements by all its prisons, police departments, prison guards, and police officers. Prison and municipal entities are creatures of the States, and, so far as the federal government is concerned, police officers and prison guards are agents of the State.

To ask whether the individual officers or entities who are defendants here personally received federal funds under the JJDPa is to ask the wrong question: The question under the statute

is whether Pennsylvania accepted such funds, and acceded to the attendant condition that all its officers -- including Corporal Keates, Officer Zimath, and Warden Matty -- obey state and federal laws regarding the incarceration of juveniles. The fact that Pennsylvania has done so, and has enacted appropriate legislation, is a matter of public record. All the defendants in this action are bound by the requirements of those laws and the JJDPa. There can be no clearer example of persons "acting under color of state law."

This Court recently reemphasized that "the coverage of [Section 1983] must be broadly construed. . . . It provides a remedy 'against all forms of official violation of federally protected rights.' . . . The burden to demonstrate that Congress has expressly withdrawn the

remedy is on the defendant." Golden State Transit Corp. v. City of Los Angeles, 58 U.S.L.W. 4033, 4034 (Dec. 5, 1989). There is no intimation, in that or any other Supreme Court decision, that there is ever a question of withdrawing the remedy as to only a subset of potential defendants.

Under the language of Section 1983 itself, of course, such a result would not even be possible. Section 1983 by its terms creates a cause of action against any person who causes the deprivation of any federal right; once a "right" is established, anyone (acting under color of state law) who causes the deprivation of that right is liable -- even if the right were not enforceable against that individual initially.

If it were otherwise, individuals could never be sued under Section 1983 for deprivations of even constitutional

rights: Like the requirements imposed under the JJDPa, constitutional rights run not against individuals but against governments; one has no constitutional right vis-a-vis other individuals to freedom of speech, or due process of law, or freedom from cruel and unusual punishment. But if any individual acts, under color of state law, to deprive another of any such rights held vis-a-vis the government, Section 1983 creates a right of action against that individual.

To hold otherwise -- that Section 1983 liability is limited to those entities upon whom a substantive duty is imposed by the original, underlying federal provision -- would vitiate Section 1983 as a vehicle for the protection not only of federal statutory rights, but also of constitutional rights. The decision of the courts below therefore threaten the underpinnings of

all judicial protection of constitutional rights against invasion by state actors. The doctrine propounded by the district court and let stand by the Third Circuit is thus of great menace and import; it conflicts with both the established precedent and the clearest, most forceful, and most recent ruling of this Court in this area of law. These reasons justify the grant of certiorari to review the judgment below.

2. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF THIS COURT AND RAISE A SIGNIFICANT QUESTION IN HOLDING THAT QUALIFIED IMMUNITY IS AVAILABLE TO THOSE WHO VIOLATE ESTABLISHED STATE AND FEDERAL STATUTORY LAW.

As an alternative ground for denying Petitioner relief, the decision below held that the individual officers were protected from liability by the doctrine of qualified immunity, because "the

question of whether the Act creates a right in favor of individual plaintiffs is a difficult one. The answer is not one that individual officers reasonably should have known." Appendix at A-11.

This ruling is contrary to the decisions of both this Court and the Third Circuit. At issue under this claim is a statutory obligation, knowledge of which respondents can hardly disclaim.

There is simply no immunity when an officer should know -- or does know --that his actions are unlawful. Malley v. Briggs, 475 U.S. 335, 345 (1986). "When a right is well established, as the Eighth Circuit recently said, 'no one who does not know about it can be called 'reasonable' in contemplation of law.'" Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984) (quoting Goodwin v. Circuit Court, 729 F.2d 541, 546 (8th Cir. 1984)). Thus, the respondents must

argue -- and the courts below accepted -- that officers should not be held liable for their knowingly unlawful conduct if they were simply uncertain that a private right of action for damages existed against them.

This is an extremely cynical perversion of the law of immunity, and one for which Petitioner can find no support in prior caselaw. Immunity is intended to provide officers with needed flexibility to act in circumstances in which they could not know that a legal prohibition against their actions would later be found. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982). It charts new -- and distressing -- ground to extend immunity to situations in which officers know or should know that their actions are plainly unlawful, and the only uncertainty the officers have is whether they can "get away with" their

knowingly unlawful conduct without paying damages. Such a novel doctrine justifies the grant of certiorari to review the judgment below.

### CONCLUSION

For these reasons, this Court should grant the writ of certiorari in this matter, and either set the cause for argument on the merits, or, in the interests of justice and judicial economy, summarily reverse the decision below or vacate the judgment and remand to the Court of Appeals for further proceedings consistent with the prior decisions of this Court.

Respectfully submitted,

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September 5, 1990



IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE,  
Plaintiff,

v.

BOROUGH OF CLIFTON HEIGHTS,  
ET AL.,  
Defendants.

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:  
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: No. 88-8562  
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MEMORANDUM

On November 14, 1987, police officers arrested plaintiff John Doe, a juvenile. Plaintiff stated that he was a juvenile and provided the officers with a Pennsylvania Personal Identification Card confirming his juvenile status. Arresting officers Keates and Zimath questioned plaintiff repeatedly about his date of birth; at one point, plaintiff "fumbled."

Plaintiff informed the arresting officers that he had a valid Pennsylvania

driver's license, but did not have the license with him. When Officer Keates ran a computer search for the license, he discovered a valid license under the same name as plaintiff's, but which bore an adult date of birth. This driver's license contained a different street address than the one shown on plaintiff's identification card, but Officer Keates was informed (incorrectly) that the two addresses were in the same area. Keates did not consider plaintiff's identification card reliable, and his experience led him to believe that an individual using a false address typically chooses one from his own neighborhood. Taking the conflicting information into account, Keates incorrectly determined that plaintiff was an adult. Plaintiff was incarcerated with adult offenders for approximately 60 hours.

In this action, plaintiff brings four distinct claims against the arresting officers, the municipality of Clifton Heights and the Delaware County Prison. Plaintiff claims that defendants' actions violated: (1) his federal statutory rights under the Juvenile Justice and Delinquency Prevention Act and the Juvenile Justice Act, 42 U.S.C. secs. 5633(a)(12)-(14), which prohibit states from incarcerating juveniles in the same facility as adults except under limited circumstances; (2) his substantive due process rights; (3) his procedural due process rights; and (4) his eighth amendment right to be free from assault by fellow prisoners.

The Municipal Defendants: Borough of Clifton Heights and Delaware County Prison

Rule 56(c) "mandates the entry of summary judgment, after adequate time for

discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue of material fact. . . .'" Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

As the Supreme Court recently stated, "our first inquiry in any case alleging municipal liability under section 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." City of Canton v. Harris, slip op. at 7 (Feb. 28, 1989). Here, the record contains no evidence of any municipal policy or custom, formal or informal, of incarcerating juveniles with adult offenders. The experience of John Doe

appears to have been an isolated incident. As a result, this Court must grant summary judgment in favor of the municipal defendants on all of plaintiff's claims.

The Individual Defendants: Corporal Keates and Officer Zimath

1. Plaintiff's constitutional due process claims

To succeed on his substantive and procedural due process claims, plaintiff must demonstrate that defendants were more than merely negligent. I find that plaintiff has failed to do so.

As discussed, supra, when officers Keates and Zimath arrested plaintiff they were presented with information which indicated that plaintiff was a juvenile. Further investigation based on plaintiff's claim that he had a valid driver's license, however, indicated that plaintiff was in fact an adult. Faced

with this situation, defendants determined, incorrectly, that plaintiff was an adult.

Defendants were negligent in determining that plaintiff was an adult. The best course of action would have been to proceed on the assumption that plaintiff was a juvenile, pending further investigation. Such action would have prevented the tragic mistake which was made in this case. However, the officers did make some attempts to verify plaintiff's age, and the record contains no evidence that their actions constituted more than mere negligence. As a result, plaintiff's claim that the individual officers violated his due process rights must fail.

## 2. Plaintiff's Eighth Amendment Claim

The Eighth Amendment provides prisoners with the right to be free from

attacks by fellow inmates. Riley v. Jeffers, 777 F.2d 143 (3d Cir. 1985). To succeed in this claim, however, plaintiff must demonstrate that officials have shown "deliberate indifference" to his safety. Id. As discussed supra, the actions of the named individual defendants were merely negligent; thus, plaintiff's eighth amendment claim also must fail.

3. Plaintiff's federal statutory claim

Section 1983 provides not only a private right of action for constitutional violations, but also for certain "claims based on purely statutory violations of federal law" by state actors. Maine v. Thiboutot, 448 U.S. 1 (1980). To recover for such a statutory violation, plaintiff must demonstrate that the federal statute in question creates an enforceable right. Pennhurst

State School and Hospital v. Halderman,  
451 U.S. 1 (1981) ("Pennhurst I").

The Supreme Court has held that where a statute creates an entitlement program, a private right enforceable under section 1983 exists. Thiboutot, 448 U.S. 1. In contrast, where a statute "does no more than express a congressional preference for certain kinds of treatment," no private enforceable right exists. Pennhurst I, 451 U.S. at 19. The Juvenile Justice and Delinquency Prevention Act (the "Act"), 42 U.S.C. secs. 5633(a)(12)-(14), provides that in order to obtain the federal funding made available under the Act, a state must not incarcerate juveniles in any institution in which they would have regular contact with

adults.<sup>1</sup> In enacting subsections 12 through 14 of the Act, Congress conferred a particular benefit on a distinct class: the class of juvenile detainees. Hendrickson v. Griggs, 672 F. Supp. 1126, 1135 (N.D. Iowa 1987). I find that "the benefits Congress intended to confer on [juveniles] are sufficiently specific and definite to qualify as enforceable rights," Wright v. Roanoke Redev. & Housing Authority, 479 U.S. 418, 432 (1987), and the Act creates a private right of action under section 1983.

I cannot, however, find that in enacting this statute Congress intended to extend this private right of action to cover suits against individual arresting officers such as defendants Keates and

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<sup>1</sup> The statute contains limited exceptions no relevant here.

Zimath. The Act simply sets forth the prerequisites with which state agencies must comply to obtain certain federal funds. As a result, I find that Congress intended to provide a private right of action only against state and/or local agencies eligible for funding under the Act.<sup>2</sup>

Moreover, even if the Act did create a private right of action against individual police officers within the meaning of Section 1983, defendants Keates and Zimath are protected from liability by a qualified immunity. Qualified immunity is available unless the official "knew or reasonably should have known" that his actions would

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As discussed supra, plaintiff has failed to submit evidence regarding a government policy. As a result, plaintiff cannot succeed in a claim against the municipal defendants.

violate the plaintiff's rights. Harlow  
v. Fitzgerald, 457 U.S. 800, 815 (1982).

Here, the question of whether the Act creates a right in favor of individual plaintiffs is a difficult one. The answer is not one that individual officers reasonably should have known.

An appropriate order follows.

**UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT**

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**Nos. 89-1881 and 89-1928**

---

**JOHN DOE,**

**Appellant, No. 89-1881**

**v.**

**BOROUGH OF CLIFTON HEIGHTS;  
ROBERT KEATES, POLICE CORPORAL, #4;  
POLICE OFFICER ZIMATH; RICHARD ROE, #1,  
Police Officers of the Borough of Clifton  
Heights; DELAWARE COUNTY PRISON;  
KENNETH MATTY and W. DAVID JONES**

---

**JOHN DOE**

**v.**

**BOROUGH OF CLIFTON HEIGHTS;  
POLICE CORPORAL ROBERT KEATES, #4;  
POLICE OFFICER ZIMATH; RICHARD ROE, #1,  
Police Officers of the Borough of Clifton  
Heights; DELAWARE COUNTY PRISON;  
KENNETH MATTY and W. DAVID JONES**

**Borough of Clifton  
Heights; Police Corporal  
Rpbert Keates, #4; and  
Police Officer Zimath,**

**Appellants, No. 89-1928**

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On Appeal from the United States District  
Court for the Eastern District of  
Pennsylvania  
(D.C. Civil No. 88-8562)  
District Judge: Marvin Katz

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Argued April 4, 1990

Before: HIGGINBOTHAM, Chief Judge, COWEN  
and NYGAARD, Circuit Judges

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**JUDGMENT ORDER**

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After consideration of the  
contentions raised by appellants, it is

ADJUDGED AND ORDERED that the  
judgment of the district court be and is  
hereby affirmed. Each party to bear its  
own costs.

ATTEST:

By the Court:

/s/Sally Mrv...,  
Clerk

/s/Robert E. Cowen,  
CIRCUIT JUDGE

Dated: April 13, 1990

On Appeal from the United States District  
Court for the Eastern District of  
Pennsylvania

(D.C. Civil No. 88-8562)

District Judge: Marvin Katz

---

SUR PETITION FOR REHEARING

---

Before: HIGGINBOTHAM, Chief Judge;  
SLOVITER, BECKER, STAPLETON, MANSMANN,  
GREENBERG, HUTCHINSON, SCITICA, COWEN  
and NYGAARD, Circuit Judges

The petition for rehearing filed by appellant, John Doe, in the above-entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court

in banc, the petition for rehearing is denied.

By the Court:  
/s/Robert E. Cowen,  
Circuit Judge

Dated: June 7, 1990

## STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

Section 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

### Section 5633. State Plans.

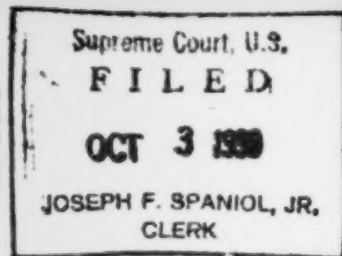
(a) Requirements. In order to receive formula grants under this part, a State shall submit a plan for carrying out its purposes applicable to a 3-year period. . . . In accordance with regulations which the Administrator shall prescribe, such plan shall --

" " "  
(14) provide that, beginning after the five-year period following December 8, 1980, no juvenile shall be detained or confined in any jail or lockup . . . .  
" " "



(2)

NO. 90-419



IN THE  
**Supreme Court of the United States**

October Term, 1990

JOHN DOE,

*Petitioner,*

v.

BOROUGH OF CLIFTON HEIGHTS, *et al.*,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**BRIEF IN OPPOSITION OF RESPONDENTS  
BOROUGH OF CLIFTON HEIGHTS,  
POLICE CORPORAL ROBERT KEATES,  
POLICE OFFICER ZIMATH,  
and RICHARD ROE #1**

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October 3, 1990

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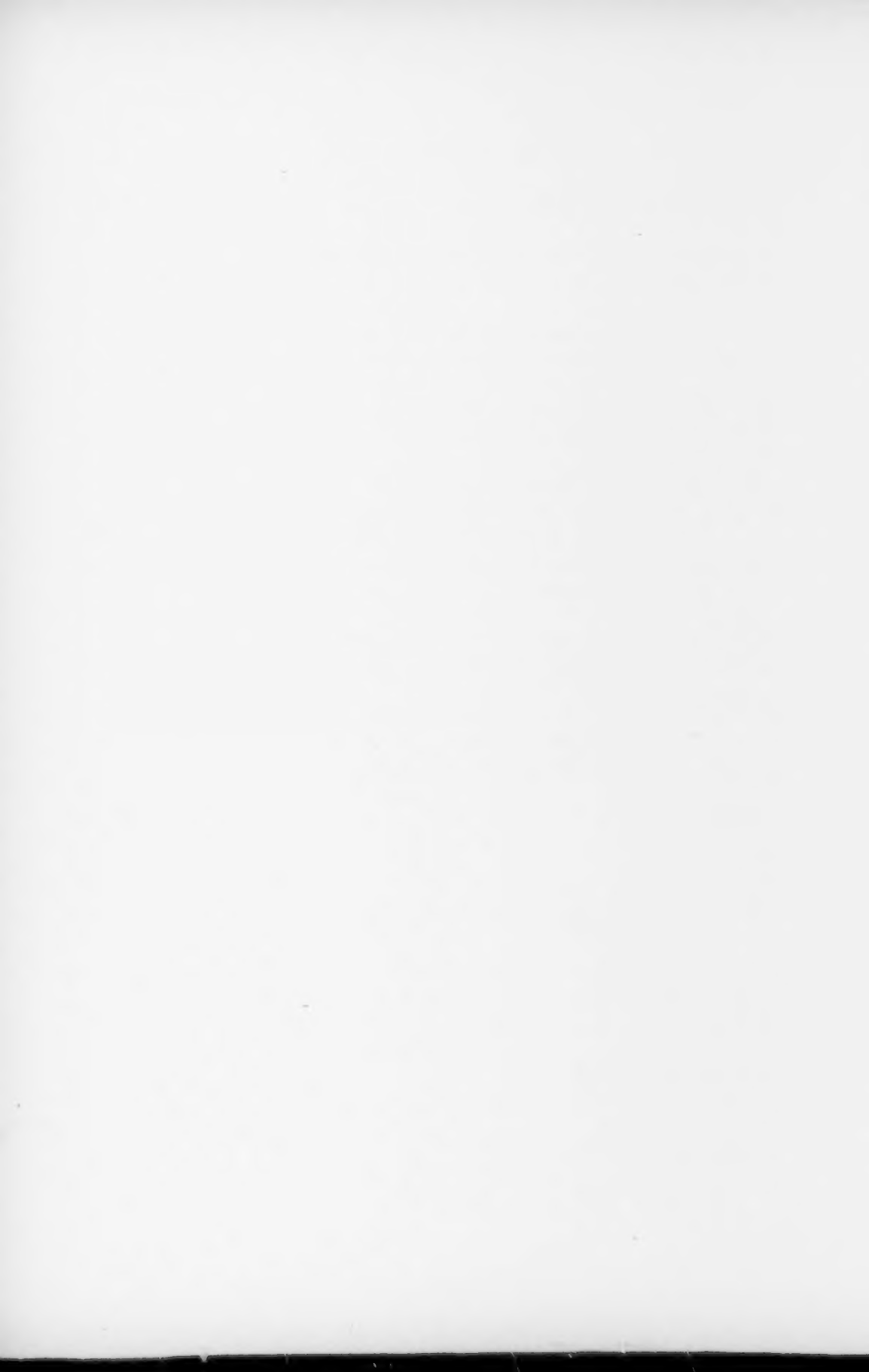


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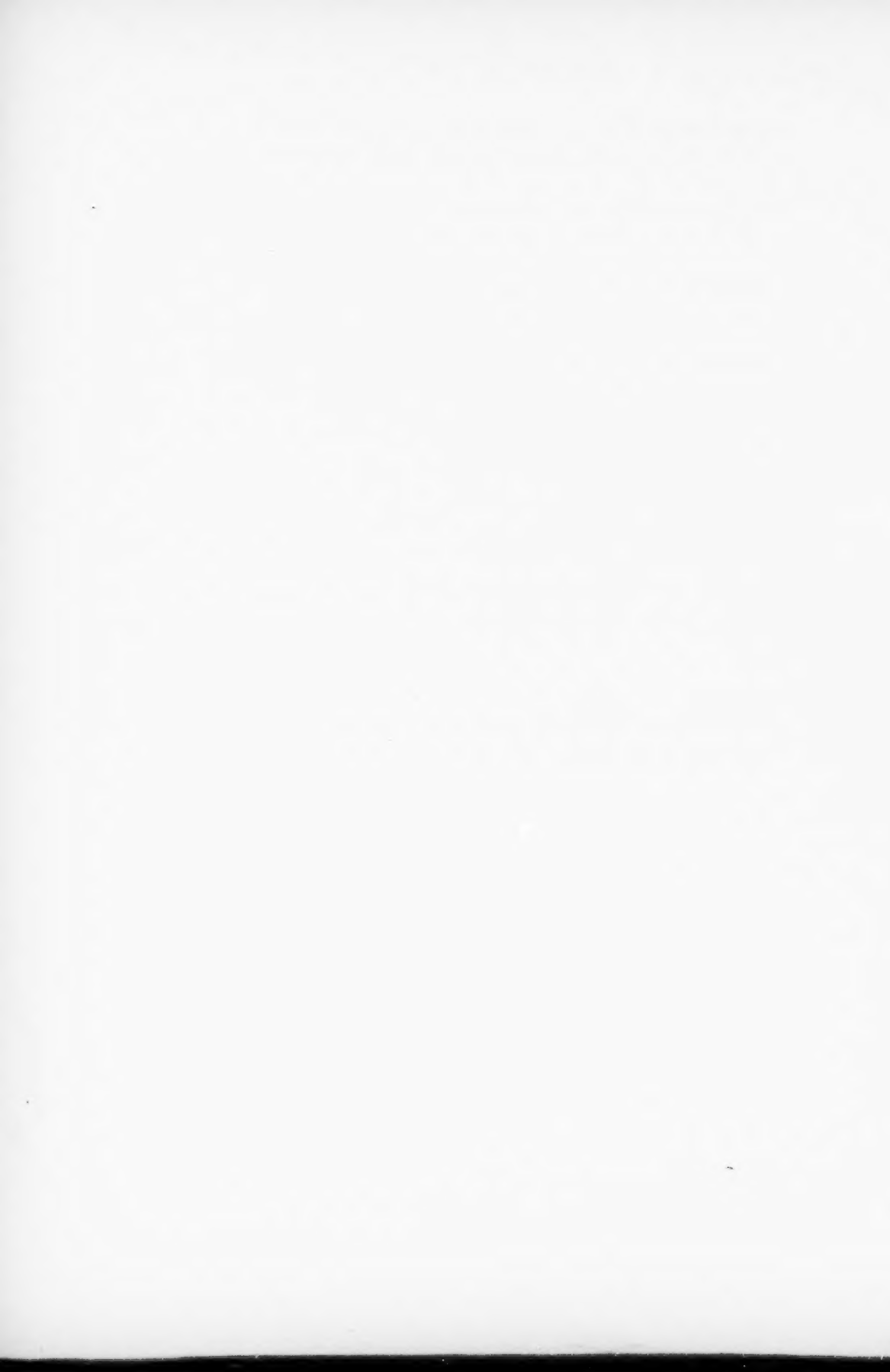
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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1990

-----  
JOHN DOE, Petitioner

v.

BOROUGH OF CLIFTON HEIGHTS, POLICE  
CORPORAL ROBERT KEATES, POLICE OFFICER  
ZIMATH, RICHARD ROE #1, DELAWARE COUNTY  
PRISON, and RICHARD ROE #2, Respondents

-----  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

-----  
The Respondents Borough of Clifton  
Heights, Police Corporal Robert Keates,  
Police Officer Zimath, and Richard Roe #1  
respectfully request that this Court DENY  
the Petition for a Writ of Certiorari,  
seeking review of the Third Circuit's de-  
cision in this case.



## STATEMENT OF THE CASE

In the early morning hours of Saturday Nov. 14, 1987 Petitioner John Doe stole a car and then led units from two police departments on a high speed chase ending when Petitioner rammed his stolen car into a police cruiser. App.6-7. At approximately 2:45 a.m. Nov. 14 Petitioner was placed under arrest by defendants Corporal Robert Keates and Police Officer Zimath of the defendant Borough of Clifton Heights. App.6-7. Petitioner was charged with aggravated assault, simple assault, theft, and other offenses. App.10.

Petitioner was processed at the Clifton Heights Police Station. There Corporal Keates followed the normal procedure of asking the arrestee his name, date of birth, and if he had a driver's license so he could run this information through the po-



lice computer system to verify the identity of the arrestee. App.103.

Petitioner first told the officers he was 18 years old, but changed his story when he found out he was going to prison, at which time he said he was 17 years old. App.117. Petitioner gave Keates several different dates of birth over the course of an hour. App.101.

Petitioner insisted he had a valid Pennsylvania driver's license, but did not have it with him. App.94-95, 101. Keates ran Petitioner's name through the police computer which disclosed that a valid Pennsylvania driver's license had been issued in Petitioner's name and carried the date of birth of 12/27/60 and an address close to one given by Petitioner. App.98, 100, 106-107. In Keates' experience, people who falsify their address usually give an ad-



dress close to their actual address. App. 100. One of the dates of birth given by Petitioner was very close to 12/27/60.

App.101. Because of these factors Keates was persuaded that Petitioner was the same person named in the driver's license and that he was an adult. App.101, 102, 106.

Keates attempted to verify this belief by calling the telephone number Petitioner gave him and by running his Social Security Number through the computer. Both efforts drew blanks. App.98-99; Supp.App.10, 11.

Petitioner's only identification on his person was a co-called "Pennsylvania Personal Identification Card." Keates had seen such purported "identification cards" many times in the course of his police duties. In his experience the information contained on these cards is false 90 percent of the time. App.8, 97. Even so, Keates attempted



to verify the information contained on the card. He called the telephone number on the card 5 to 10 times without receiving an answer. App.108.

Keates decided to reject the birth date listed on the card -- 4/5/70 -- because he distrusted such cards and could not verify any of the information on it. App.104. The card itself expressly warns that the "card issuer not responsible for ID card validity." App. 8.

At the time of arrest, Petitioner was over 6 feet tall and weighed more than 170 pounds. Based on his years of police experience Keates believed Petitioner looked like an adult. App. 110.

When Keates drafted the Affidavit of Probable Cause and the Criminal Complaint against Petitioner he listed the caption as Petitioner "a/k/a John Doe." App.6-7, 10.



This type of caption is normal procedure when the arresting officer cannot positively substantiate the identity of the accused. App.112. The Affidavit of Probable Cause expressly and in detail explains the difficulty Keates had in attempting to verify Petitioner's identity and age. It concludes that Keates was unable to verify any of the information provided by Petitioner. App.7.

The Affidavit of Probable Cause and Criminal Complaint were presented to District Justice Perfetti at Petitioner's arraignment between 7 a.m. and 9 a.m. Saturday Nov. 14, 1987. Supp.App.22-25. That is, Petitioner was arraigned approximately six hours after arrest in accordance with the strict requirements of Pa.R.Crim.P. 130(a) and the Pennsylvania Supreme Court's Davenport/Duncan rule.

At his arraignment Petitioner told District Justice Perfetti he was only 17 years



old. Supp.App.18. District Justice Perfetti examined Petitioner's appearance and his "Pennsylvania Identification Card," the Affidavit of Probable Cause, and the Criminal Complaint. He concluded Petitioner was an adult and committed him to the defendant Delaware County Prison when he could not make bail. Supp.App.18.

Neither the Borough of Clifton Heights nor any of its officers had any part in deciding to commit Petitioner to the Delaware County Prison. District Justice Perfetti filled out and signed the Commitment Order. App. 113. Petitioner was subsequently transported to the Prison by county constables. Supp.App. 26.

Petitioner was allegedly assaulted in the Prison two nights later. Petitioner admits that no assaults or harm of any type occurred to him while he was in the custody of the Clifton Heights Police. Supp.App. 21.



It subsequently transpired that the birth date of 4/5/70 on Petitioner's "identification card" was accurate, making him 17 years, 7 months, and 9 days of age when he was arrested.

Keates has never had any difficulties in ascertaining an individual's age from his appearance. App.109. Except for this single incident, neither Keates nor Officer Zimath had ever arrested someone who was processed as an adult but was later determined to be a juvenile. Nor had either officer even been the subject of a complaint of any kind concerning his performance as a police officer. Supp.App. 7, 12.

Except for this single incident, the Borough of Clifton Heights never processed an individual as an adult who was later discovered to be a juvenile. Nor had such a mis-identified person ever been incarcerated in the Delaware County Prison after



arrest by the Borough's police. Supp.App.

4, 11.

REASONS WHY THE PETITION  
SHOULD BE DENIED

- A. PETITIONER NEVER ALLEGED OR PROVED PENNSYLVANIA OR THE BOROUGH OF CLIFTON HEIGHTS PARTICIPATES IN OR RECEIVES FUNDING UNDER THE JJDP.

The predicate for Petitioner's civil rights action under 42 U.S.C. §1983, is Respondents' alleged violation of the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §5633(a)(12), (13) & (14) ("JJDP"). The JJDP is a federal-state grant program whereby the federal government provides financial assistance to participating states to aid them in creating programs to improve their juvenile justice systems. Participation in the JJDP is voluntary and states are given the choice of complying with the conditions set forth in the Act or forgoing



the benefits of federal funding. See §5633.

However, Petitioner's Complaint did not allege that Pennsylvania or the Borough of Clifton Heights participate in the JJDPa program or receive funding from that program. App.37-49. After thorough discovery Petitioner failed to produce any evidence whatsoever that Pennsylvania or the Borough participate in or receive funding under the JJDPa.

Without such participation or funding, the Borough and its officers do not fall within the strictures of the JJDPa. It would be absurd to hold Respondents liable for violations of the JJDPa when there is no evidence they participate in it.

Due to this fundamental flaw in Petitioner's pleading and proof, this case is not an appropriate vehicle to determine the questions presented by Petitioner. Accordingly, the Petition should be denied.



B. THE RESOLUTION OF PETITIONER'S QUESTIONS ARE IRRELEVANT IN THIS CASE SINCE THE LOWER COURTS' RULING RESTS ON FIRM ALTERNATIVE GROUNDS.

1. As to the Borough of Clifton Heights

The district court ruled against Petitioner and in favor of the Borough on all of Petitioner's claims. The basis for this ruling was Petitioner's total failure to present any evidence of a municipal policy or custom violating the JJDPa. As the court stated:

As the Supreme Court recently stated, "our first inquiry in any case alleging municipal liability under section 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." City of Canton v. Harris, slip op. at 7 [109 S.Ct. 1197, 103 L. Ed.2d 412, 424 (1989)]. Here, the record contains no evidence of any municipal policy or custom, formal or informal, of incarcerating juveniles with adult offenders. The experience of John Doe appears to have been an isolated incident. As a result, this Court must grant summary judgment in favor of the municipal defendants on all of plaintiff's claims. [A-4]



Petitioner does not now challenge the validity or correctness of this ruling. Although Petitioner raised this issue before the Court of Appeals, he abandoned it in his Petition for Rehearing and continues to abandon it in the present Petition.

Any answer by this Court to the two questions presented by Petitioner would not implicate or affect in any manner the actual basis for the lower courts' ruling: Petitioner's failure to prove municipal policy or custom. Regardless of whether or not the JJDDPA applies to the Borough, Petitioner does not challenge the ruling that the Borough does not violate the JJDDPA by policy or custom.

The only time the Borough can be liable under §1983

is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury



that the government as an entity is responsible under §1983.

Monell v. Department of Social Services,  
436 U.S. 658, 694 (1978).

Consequently, if Petitioner fails to prove the existence of such a policy or custom, his suit must fail as a matter of law.

Petitioner's question regarding qualified immunity also is irrelevant to the Borough because it is not liable under §1983 for any form of vicarious liability including the doctrine of respondeat superior. Monell, 436 U.S. at 691.

2. As to Corporal Keates, Officer  
Zimath and Richard Roe #1

Petitioner's questions are irrelevant to Corporal Keates, Officer Zimath and Richard Roe #1 because no matter how the JJDPA is interpreted, they did not violate it. That is, they did not incarcerate



Petitioner in an adult facility: District Justice Perfetti and defendant Delaware County Prison did.

Keates and Zimath made District Justice Perfetti fully aware of their uncertainty as to Petitioner's identity and age. After questioning Petitioner, District Justice Perfetti concluded he was an adult and committed him to Delaware County Prison. He was transported by Delaware County constables to the Delaware County Prison where he was locked up with adults and allegedly assaulted. Petitioner admits he was not harmed or assaulted in any way while he was in the custody of the Borough or its officers.

As such, neither the Borough nor any of its officers are responsible for committing Petitioner to an adult jail.

Thus, no matter how this Court answers the questions presented by Petitioner, the



lower courts' rulings will remain unaffected because they rest on a different and still viable ground.

Furthermore, it is clear Corporal Keates and Officer Zimath were, at worst, merely mistaken in their judgment as to Petitioner's age. It is also clear that such an error of judgment or mere negligence is not sufficient to destroy their qualified immunity and subject them to §1983 liability.

The Borough's officers had between 2:45 a.m. and 9 a.m. on a Saturday to complete their investigation and present Petitioner for a prompt arraignment as required by Pa.R.Crim.P. 130(a). The Pennsylvania Supreme Court has mandated arraignment within six hours of arrest. Commonwealth v. Davenport, 471 Pa. 278, 286, 370 A.2d 301, 306 (1977), Commonwealth v. Duncan, 514 Pa. 395, 525 A.2d 1177, 1182-1183 (1987). The arraignment cannot be delayed past this six



hour period even if a continued investigation by the police would exculpate the accused. Commonwealth v. Eaddy, 472 Pa. 409, 372 A.2d 759, 761 (1977); Commonwealth v. Morton, 475 Pa. 374, 380 A.2d 769, 773 (1977).

Failure to comply with these state rules of criminal procedure and to delay Petitioner's arraignment would have given rise to a valid §1983 action against the Borough and its officers. See, Anela v. City of Wildwood, 790 F.2d 1063 (3d Cir.), cert. denied 479 U.S. 949 (1986).

In the limited time available to them, Corporal Keates and Officer Zimath tried every avenue of ascertaining Petitioner's identity and age. See, pages 2-8, supra. After this investigation they concluded Petitioner was an adult.

Keates and Zimath may be denied qualified immunity from §1983 liability only if



a reasonably well-trained police officer in their position would have concluded Petitioner was a minor, or if no reasonably competent officer would have concluded he was an adult. Malley v. Briggs, 475 U.S. 335, 345, 341 (1986). (\*)

Contrary to Petitioner's interpretation of Malley, this objective standard "gives ample room for mistaken judgments." Malley, 475 U.S. at 343. See also, Baker v. McCollan, 443 U.S. 137, 146 (1979) ("Nor is the official charged with maintaining custody of the accused ... required by the Court to perform an error-free investigation").

Based on the information at hand and their experience, Corporal Keates and Officer Zimath concluded Petitioner was an

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\* This objective standard permits the resolution of insubstantial claims such as Petitioner's on summary judgment. Malley v. Briggs, 475 U.S. at 341.



adult. Although erroneous, this conclusion was not so objectively unreasonable as to deny qualified immunity to Corporal Keates and Officer Zimath. That is, because officers of reasonable competence could disagree as to whether Keates and Zimath should have known Petitioner was a minor, a qualified immunity should be recognized. Malley v. Briggs, 475 U.S. at 341.

In essence, Petitioner seeks to do an end run around the district court's finding that Corporal Keates and Officer Zimath were, at worst, merely negligent in their investigation of Petitioner's age. See district court opinion at pages A-6 & A-7 of the Petition.

As the district court correctly ruled, an individual's mere negligence or lack of due care will not suffice to impose \$1983 liability upon him. Daniels v. Williams, 474 U.S. 327, 328, 331-333 (1986).



Thus, Keates' and Zimath's subjective understanding of the rights allegedly created by the JJDPa is irrelevant because when their actual conduct is judged by Malley's objective standard, they are still entitled to a qualified immunity.

Petitioner's question concerning qualified immunity seeks to determine §1983 liability based on the subjective knowledge of Keates and Zimath. However, Malley requires an objective appraisal of the officers' conduct. The district court performed such an appraisal and concluded they were merely negligent and mistaken in their judgment. Such a finding does not suffice to destroy the qualified immunity to which Corporal Keates and Officer Zimath are entitled by Malley and this Court's past decisions.

This case does not present an instance of deviation from this Court's precedent or



that of the Third Circuit. On the contrary, it presents an instance of the district court correctly applying precedent to a straight forward fact pattern and ruling in favor of Respondents.

#### CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 3, 1990

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No. 90-419

Supreme Court, U.S.  
FILED

OCT 9 1990

JOSEPH F. SPANIOLO, JR.  
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In The  
**Supreme Court of the United States**

October Term, 1990

JOHN DOE,

*Petitioner,*

v.

BOROUGH OF CLIFTON HEIGHTS, et al.,

*Respondents.*

On Petition For Writ Of Certiorari To The  
United States Court Of Appeals  
For The Third Circuit

**RESPONDENTS' BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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October 8, 1990

## QUESTIONS PRESENTED

1. Whether 42 U.S.C. §1983, which creates a right of action against "any person" who deprives another or causes another to be deprived of his rights under federal law, makes violations of private rights under a federal funding statute actionable only against recipients of federal funds under that statute.

2. Whether qualified immunity is available in a suit under §1983 to those who violate established state and federal statutory law, simply because they did not think that they would subsequently be held liable for damages under §1983.

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## **STATEMENT OF THE CASE**

### **a. Procedural Posture**

This is a civil rights action for damages only brought in the Eastern District of Pennsylvania pursuant to 42 U.S.C. §1983 ("§1983"). The action arises out of the erroneous, adult commitment of Petitioner John Doe ("Petitioner"), to an adult county prison for approximately 56 hours. In fact, Petitioner was 17 years and 7 months at the time of the events in question. In this action, Petitioner has made only federal claims; he has not raised any state claim at any stage of this proceeding. No pendent jurisdiction has been alleged. See Complaint, paragraph 2, App. p.37.

In the District Court, Petitioner pursued claims based upon alleged violations of substantive and procedural due process, upon alleged "deliberate indifference" to the safety of Petitioner, and upon an alleged violation of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5601, et seq. ("JJDPA"). In this Court, Petitioner pursues only the JJDPA claim and the question of immunity arising from the alleged violation of that Act.

Two groups of defendants are involved in this civil action. The first group is composed of the Borough of Clifton Height, the Pennsylvania municipality where the arrest and adult commitment of Petitioner occurred, and the participating police officers, Police Corporal Robert Keates, Police Officer Zimath, and Richard Roe #1 (collectively "Police Respondents"). The second group was originally designated as the "Delaware County Prison and Richard Roe #2, guards and/or employees of Delaware

County Prison." See Caption of Complaint, App. p.37. As evident from this designation, at the commencement of this action, there was no viable defendant before the District Court from the "second group." The "Delaware County Prison" ("Respondent Prison") is a descriptive term, is not a legal entity under state law, and, it was contended, not a "person" within the meaning of §1983. Similarly, "Richard Roe #2" was by definition not a named individual defendant.

In any event, to correct these omissions, the Delaware County Prison Board a/k/a Board of Prison Inspectors of Delaware County ("Respondent Prison Board") was added as a party defendant by Order dated July 12, 1989. See Civil Docket entries, App. p.4. Further, Warden Kenneth Matty ("Respondent Warden") and Correctional Officer David W. Jones ("Respondent Correctional Officer") were also added as parties defendant by Order dated September 13, 1990. See Civil Docket entries, App. p.5. Respondent Correctional Officer was "on duty" in the Intake Unit the night of the alleged sexual assault. This Brief in Opposition is filed on behalf of Respondents Prison, Prison Board, Warden and Correctional Officer (collectively, "Prison Respondents").

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In the District Court, both the Police Respondents and Prison Respondents filed Motions for Summary Judgment. The Motion of Prison Respondents was based upon (1) the absence of any actionable "policy" under *Monell v. N.Y. City Dept. of Soc. Services*, 436 U.S. 658 (1978); (2) the absence of any constitutional due process claim under *Baker v. McCollan*, 443 U.S. 137 (1987) and

*Hewitt v. Helms*, 459 U.S. 460 (1983); (3) the absence of any "deliberate indifference" under *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986); (4) "absolute immunity" under *Lockhart v. Hoenstein*, 411 F.2d 455 (3rd Cir.) cert. den. 396 U.S. 941 (1969); and (5) "good faith" immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

By Order dated September 13, 1989, the District Court granted both Motions for Summary Judgment. In its Memorandum supporting the Order granting Summary Judgment, see Petition for Writ of Certiorari, A-1 to A-11, the District Court expressly and by implication accepted the arguments as to Prison Respondents concerning the absence of an actionable policy, the absence of any due process violation, the absence of deliberate indifference, and the applicability of "good faith" immunity.

The District Court rejected the argument of Petitioner based upon the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5601, et seq. ("JJDP"), primarily on the basis of an absence of any policy of violating that Act. Further, while the District Court did accept the argument of Petitioner that a §1983 cause of action was available to enforce rights under the JJDP, the District Court rejected such a claim against all Respondents because "... Congress intended to provide a private right of action only against state and/or local agencies eligible for funding under the Act." See Memorandum of District Court in Petition for Writ of Certiorari, A-10.

From this Order of the District Court, Petitioner filed a timely Notice of Appeal to the Court of Appeals for the

Third Circuit. After oral argument on April 4, 1990, which affirmed the summary judgment granted by the District Court. See Petition for Writ of Certiorari, A-12 and A-13. By implication, the Court of Appeals had rejected the argument of Petitioner based upon the JJDPa. Thereafter, Petitioner filed a timely Petition for Rehearing which Petition was denied by the Court of Appeals by Order of June 7, 1990. See Petition for Writ of Certiorari, A-14 and A-15. On September 4, 1990, Petitioner filed his Petition for a Writ of Certiorari with the Supreme Court.

**b. Counterstatement of Facts**

Petitioner misstates the "crucial facts" that were the basis of the summary judgment in this civil action. First, as to the Prison Respondents, the Petitioner was not considered "a juvenile at the time of the events in question." On the contrary, the Petitioner was considered an adult commitment who was claiming to be a juvenile. Second, also as to Prison Respondents, the Petitioner was not a juvenile "sent to an adult prison, where he was celled with adult offenders." On the contrary, again, Petitioner was considered an adult commitment who was sent to an adult prison where he claimed to be a juvenile. Pending verification of this claim, Petitioner was celled with adult inmates. And finally, at no time in these proceedings, have Prison Respondents ever conceded that their treatment of Petitioner was in violation of either state or federal law. In fact, as earlier stated, Petitioner never raised or pursued below any state law claim. With respect to federal law, in the view of Prison Respondents, the JJDPa simply does not address the question of an

erroneous commitment. On the contrary, as noted by the District Court in its Memorandum, this case was nothing more than an "isolated incident" involving the erroneous commitment of a juvenile, as an adult, to an adult prison.

Significantly, the adult commitment of Petitioner was due in material part to misinformation provided by him to Respondent Police Officer Robert Keates ("Respondent Keates"). At the police station, Petitioner advised Respondent Keates that he had a valid Pennsylvania driver's license. See Dep. Trans. of Respondent Keates, App. pp.94-101. This information was false, but was used by Respondent Keates to identify Petitioner as an adult. See Dep. Trans. of Respondent Keates, App. p.106. In any event, both the District Court and the Court of Appeals agreed that the conduct of Respondent Keates in identifying Petitioner as an adult was "negligence" only and not actionable under §1983. See *Daniels v. Williams*, supra; *Davidson v. Cannon*, supra. Petitioner has not challenged in this Petition for a Writ of Certiorari this legal conclusion of the District Court which was affirmed by implication by the Court of Appeals.

Petitioner John Doe was incarcerated at the Delaware County Prison pursuant to a facially valid, adult commitment order of District Justice John Perfetti. See Exhibit #3 to Affidavit of Respondent Warden, Supp. App. p.221. Petitioner has not challenged the sufficiency or adequacy of the "process" which resulted in the issuance of this order. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1987). Petitioner never sued the Bail Agency which approved adult bail for Petitioner or the District Justice who committed Petitioner. Under Pennsylvania law, a

District Justice is prohibited from so committing a known juvenile, 42 Pa. C.S.A. §6303(b).

Petitioner was committed to the Delaware County Prison at approximately 12:10 p.m., Saturday afternoon, November 14, 1987. See Exhibit #2 to Deposition of Petitioner, App. p.33, and Dep. Trans. of Correctional Officer Michael Pelleriti, App. p.127. At commitment, Petitioner had no identification on his person. See Dep. Trans. of Petitioner, App. p.168; Dep. Trans. of Michael Pelleriti, App. p.131. Upon commitment, Petitioner had an "intake interview" with Correctional Officer Pelleriti during which he claimed to be a juvenile. See again Exhibit #2 to Deposition of Petitioner, App. p.33. In response to this information, Correctional Officer Pelleriti gave Petitioner the opportunity to substantiate his claim by contacting anyone he wished by phone. See Dep. Trans. of Michael Pelleriti, App. pp.128-132. Petitioner has admitted that he attempted three times that afternoon to phone his family. See Dep. Trans. of Petitioner, App. pp.168-170, 173. Although Petitioner claims to have attempted to reach his grandmother, she has testified she is "sure" she was home all day Saturday. See Dep. Trans. Birdie Whyche, Supp. App. p.224.

In any event, in the early evening of Saturday, November 14, 1987, Petitioner was transferred upstairs in the Intake Unit to a multi-man cell, Cell #6. Petitioner was placed in Cell #6 because other individuals housed therein had basically similar charges. See Dep. Trans. of Michael Pelleriti, App. pp.119-124; Answer of Prison Respondents to Interrogatory #2, Supp. App. p.198. The other inmates in Cell #6 were adults. See names and ages in Answer of Prison Respondents to Interrogatory #3,

Supp. App. p.198. Petitioner has admitted that he did not feel threatened by any of his cellmates, that these cellmates never threatened or hit him, and that no cellmate was involved in the alleged sexual assault. See Dep. Trans. of Petitioner, App. pp.171-172. Multi-man cells are used in the Intake Unit for safety reasons. See Affidavit of Respondent Warden, paras. 7 and 8, Supp. App. pp.208-209.

On Sunday, November 15, 1987, Petitioner has testified that he did not request to make any phone calls although a guard was available to ask. See Dep. Trans. of Petitioner, App. pp.173-174. On Monday morning, November 16, 1987, during his interview with Intake Counsellor Eugene Farina, Petitioner was able to contact his grandmother by phone. See Dep. Trans. of Petitioner, App. pp.174-175 and Dep. Trans. of Eugene Farina, App. pp.143-145. His grandmother was able to substantiate his claim to proper authorities and he was released to the Juvenile Detention Center – a separate facility in another location – in the early evening of November 16, 1987.

As a matter of policy and state law, juveniles – except those charged with murder or certified as adults – are not committed to the Delaware County Prison. See 41 Pa. C.S.A. §6327. With respect to adult commitments who claim to be juveniles – such as Petitioner – the procedures followed by Correctional Officer Michael Pelleriti and Intake Coordinator Eugene Farina complied with prison policy. This policy and its justification are explained in depth by Respondent Warden in his Affidavit, paras. 5 through 9. See Supp. App. pp.205-210. The Petitioner has not requested review of the question whether this policy violated any 14th Amendment or state law “liberty”

interest, see *Hewitt v. Helms*, 459 U.S. 460 (1983). Rather, Petitioner seeks review of these procedures and policy only as they relate to the JJDP. For the reasons explained herein, Prison Respondents contend that no reason for certiorari exists and that proper justice has been done by the courts below.

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## ARGUMENT

### a. Summary of Argument

Prison Respondents contend that the rulings of the District Court and the Court of Appeals for the Third Circuit are correct, that they involve no substantial federal question, and that they are consistent with, rather than in conflict with, existing Supreme Court precedents. Prison Respondents contend, therefore, that no reason exists for a Writ of Certiorari to be granted.

Prison Respondents believe that Petitioner has misapprehended from the beginning of this civil action several basic legal principles which are fatal to his cause. First, Petitioner has forgotten the "policy" requirement for municipal liability under §1983. *Monell, supra*; *City of Canton v. Harris*, \_\_\_ U.S. \_\_\_, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989). Second, Petitioner has forgotten the theory of potential liability under the Spending Clause, Article I, §8, cl. 1 of the United States Constitution. *Pennhurst State School v. Haldeman*, 451 U.S. 1 (1981); *Guardians Association v. Civil Service Commission of New York City*, 463 U.S. 582 (1983). Third, Petitioner has forgotten the distinction between the existence of a cause of action and the non-

availability of a damages remedy in Spending Clause litigation. *Pennhurst*, *ibid.*; *Guardians Association*, *ibid.* Fourth, Petitioner has simply misread the JJDP. And finally, Petitioner has misunderstood the concept of "good faith" immunity under *Harlow v. Fitzgerald*, *supra*.

Because the District Court and Court of Appeals have either correctly understood these concepts and applied them to the facts of this case, or have simply failed to address the non-issues which have been raised by Petitioner, Prison Respondents contend that no reason exists for this Petition to be granted.

#### **b. The Absence of a Municipal Policy**

Before liability can be imposed upon a "municipal actor", the existence of an actionable "policy or custom" must be present. *Monell*, *supra*. To be actionable, there must be a direct causal link between the execution of the "policy or custom" and the constitutional violation. *City of Canton*, *supra*, pp.424 and 427.

In this case, Petitioner has simply failed to show the existence of any "policy or custom" of incarcerating juveniles in the Delaware County Prison. As the District Court noted:

Here, the record contains no evidence of any municipal policy or custom, formal or informal, of incarcerating juveniles with adult offenders. The experience of John Doe appears to have been an isolated incident.

See Memorandum of District Court in Petition for a Writ of Certiorari, A-4 and A-5.

This conclusion was absolutely correct, involved no novel or substantial federal question, and was consistent with existing Supreme Court precedent. Petitioner was committed erroneously to the Delaware County Prison despite extensive State procedures and law prohibiting the incarceration of juveniles with adults. Accordingly, if any constitutional violation occurred, it did not occur pursuant to any "policy or custom" of Respondent Prison, Respondent Board, or Respondent Warden in his official capacity. *City of Canton, supra*. For this primary reason, Prison Respondents contend that this Petition should be denied.

**c. The "Consensual" Nature of Spending Clause Liability**

When Congress acts under the Spending Clause, there is no question that it may set the conditions "on which it shall disburse federal money to the States." *Pennhurst, supra*, p.17. Moreover,

. . . in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously. *Pennhurst, ibid.* p.17.

These basic principles have direct relevance to the claim of Petitioner with respect to both Police Respondents and Prison Respondents. In the view of Prison Respondents, the holdings of the District Court "... that Congress intended to provide a right of action only against state and/or local agencies eligible for funding under the Act", see Memorandum of the District Court in Petition for Writ of Certiorari, A-10, is nothing more than a correct application of the principle that Spending Clause liability is "consensual" in nature and non-recipients of federal funds cannot be liable because they have not consented to anything.

At all times material in this civil action, it has been correctly assumed that Respondent Prison Board is a "non-recipient" of any federal monies disbursed under the JJDPa. Accordingly, because Respondent Prison Board has not consented to comply with any condition imposed by Congress, Respondent Prison Board contends, initially, that it cannot be liable for any alleged breach of any alleged condition, and that the holding of the District Court which was affirmed by the Court of Appeals was correct. This conclusion also holds true for Respondent Warden in his official capacity. See *Kentucky v. Graham, et al.*, 473 U.S. 159 (1985), indicating that a suit against an individual in his official capacity is equivalent to a suit against the entity for which he is an agent.

It is not an answer to this defense that the Commonwealth of Pennsylvania has consented to the conditions required for the receipt of JJDPa funds. See Petition for Writ of Certiorari, pp.20-21. At no time in this civil action has Petitioner conducted any discovery concerning the nature and scope of the "consent" of the Commonwealth

of Pennsylvania. Whether or not this "consent" encompassed local municipalities and/or local prisons who are non-recipients of JJDPAs monies has never been determined. No evidentiary materials whatsoever were submitted by Petitioner on this issue in opposition to the Motions for Summary Judgment of Respondents. The issue was not, therefore, properly raised in the District Court and is not now an appropriate subject for review. See *Celotex v. Catrett*, 477 U.S. 317 (1986). In any event, given the state of the record, Respondent Prison Board contends that it must be considered a separate, governmental body under state law, see the Act of April 11, 1866, P.L. No. 562, that it has not consented to any condition under the JJDPAs, and that it cannot, therefore, be liable under that Act.

Even assuming Respondent Board is an appropriate defendant, what "condition" of the JJDPAs was violated by what "policy" of Respondent Board or by the Respondent Warden in his official capacity? As discussed later in this Brief, there is simply nothing in the JJDPAs or accompanying Regulations, 28 C.F.R. §31.1, et seq., which in any way establishes any substantive or procedural rights with respect to a juvenile who has been committed erroneously, as an adult, to an adult facility.

Accordingly, because recognition of any such substantive or procedural right simply has not been "unambiguously" established by Congress as a "condition" to the receipt of JJDPAs monies by the Commonwealth of Pennsylvania, see *Pennhurst*, supra, p.17, it follows no liability under the JJDPAs can be established in this case.

Under Spending Clause legislation, "ambiguous" conditions are beyond the power of Congress to impose, *Pennhurst*, supra, and are, therefore, unenforceable. For this reason as well, Prison Respondents contend that this Petition should be denied.

**d. The Nature of a Remedy in Spending Clause Litigation**

Because of the absence of any substantive or procedural rights in the JJDPa concerning erroneously committed juveniles, Prison Respondents contend initially that this Act does not create a private cause of action under the facts of this case. *Pennhurst*, supra.

Even assuming the existence of some type of cause of action under §1983, this does not resolve the question of an appropriate remedy. In this case, Petitioner has assumed that, if a cause of action under the JJDPa were implied, then a damages remedy would be available under §1983. This assumption is incorrect for the question of whether a cause of action exists is "analytically distinct" from the question of what is the available remedy. *Davis v. Passman*, 442 U.S. 228, 239 (1979); *Guardians Association*, supra, p.595.

In this action, the parties agree that the JJDPa is legislation which has been enacted solely under the Spending Clause, Article I, §8, cl. 1 of the United States Constitution. Thus, conceding the availability of a private cause of action under the JJDPa, the more specific question is what remedy exists for a violation of Spending Clause legislation? In the view of Prison Respondents,

Petitioner would be entitled under §1983 solely to declaratory and injunctive relief, and not to compensatory damages.

As stated expressly by Justice White in *Guardians Association*, *ibid.* p.598:

Hence, absent clear congressional intent or guidance to the contrary, the relief in private actions should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations. Additional relief in the form of money or otherwise based on past unintentional violations should be withheld.

See also *Pennhurst*, *supra*, p.29.

Because no Spending Clause case to date has found compensatory damages available, the rulings of the District Court and Court of Appeals are correct and consistent with established precedent. The case cited by Petitioners, *Wilder v. Virginia Hospital Association*, \_\_\_ U.S. \_\_\_, 110 L.Ed.2d 455, \_\_\_ S.Ct. \_\_\_ (1990), is not support for a damages remedy. *Wilder* was a civil action under Spending Clause legislation for declaratory and injunctive relief. That the majority in *Wilder* found an implied cause of action available is simply no support whatsoever for the compensatory remedy which Petitioner seeks here. It is significant that Justice White, who was in the 5 to 4 majority in *Wilder*, has specifically rejected the availability of a compensatory remedy for unintentional violations of legislation enacted pursuant to the Spending Clause, *Guardians Association*, *supra*.

For this reason as well, Prison Respondents contend that the rulings of the District Court and Court of Appeals were correct and that this Petition for Certiorari need not be granted.

**e. The Requirements of the JJDPa**

In the view of Prison Respondents, the JJDPa deals with the intentional treatment of juvenile offenders. That is, the Act deals with what is required of a consenting State once the issue of non-age has been resolved and the individual has been determined to be a juvenile. Nowhere in either the Act or in the accompanying Regulations is the situation of an erroneous commitment considered.

Prison Respondents begin by noting the language of the statute itself. In 42 U.S.C. §5633(a)(14) it states " . . . no juvenile shall be detained or confined in any jail or lock-up for adults." 42 U.S.C. §5633(a)(12) and (13) contain similar language. This language, in the view of Prison Respondents, assumes that the issue of whether an individual is a "juvenile" has been determined and prohibits intentional detainment or confinement of a "juvenile" in an adult facility. By definition, detainment and confinement imply intentional conduct on the part of the actors. This analysis finds support in *Hendrickson v. Griggs*, 672 F.Supp. 1126, 1139 (D.C. Iowa 1987), where the State conceded that juveniles still were intentionally housed with adults.

In his Petition for Writ of Certiorari, at fn.1, Petitioner cites to the Regulations, 28 C.F.R. §§31.303(f)(5) (iv)(G) and (H) as authority for a "six-hour" holding

requirement. These particular provisions are merely "reporting requirements", however, and do not establish substantive or procedural rights. Further, the administrative definitions of "juvenile criminal-type offender", see 28 C.F.R. §§31.304(f) and (g), do not encompass a juvenile erroneously committed as an adult. In any event, Prison Respondents contend this alleged "six-hour" limitation is simply inapplicable.

Further, as also recognized in *Hendrickson*, *ibid.* p.1138, Congress has provided that "deminimus exceptions" can occur without a State being in violation of the Act. See 28 C.F.R. §§31.303(f)(6)(i), (ii) and (iii). By the terms of those Regulations, the erroneous commitment in this case meets the requirements of a "deminimus exception" and should not be considered a violation of the JJDPA.

Because there has been no violation of the JJDPA, Prison Respondents contend again that the rulings of the District Court and Court of Appeals were correct and that this Petition for Certiorari need not be granted.

**f. The Complete Absence of Any Immunity Issue**

On the question of the "personal" liability of Respondent Warden and Respondent Correctional Officer, it has not been determined to date what acts and/or omissions on their part caused the deprivation of the alleged rights of Petitioner under the JJDPA. See *Monroe v. Pape*, 365 U.S. 167 (1961). For this reason alone, no review as to their "personal" liability is warranted.

Overlooking this initial obstacle, it is contended by Respondent Warden and Respondent Correctional Officer that "good faith" immunity was plainly available. As held in *Harlow v. Fitzgerald*, supra, p.818, " . . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." This is an objective test and, contrary to the argument of Petitioner, necessarily involves an analysis of existing legal rights and duties.

In this case, the District Court held and the Court of Appeals affirmed that, whatever rights Petitioner had under the JJDPa at the time of his commitment, these rights certainly were not "clearly established." See Memorandum of District Court in Petition for Writ of Certiorari, A-10 and A-11. This conclusion was correct then and is correct now. An erroneously committed juvenile has no "clearly established" substantive or procedural rights under the JJDPa or accompanying Regulations which could serve as a basis for personal liability. For this reason as well, any review on this issue is not warranted.

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### CONCLUSION

For the reasons expressed above, Prison Respondents contend that the Petition for Writ of Certiorari should be denied. No purpose can be served by further review of the decisions of the District Court and the Court of Appeals. Rather than being contrary to existing precedent, the decisions below were consistent with, if not

compelled by, Supreme Court case law. Unfortunately for all concerned, Petitioner has simply misapprehended applicable law or has refused to accept this law as applied to the facts of this case. Prison Respondents respectfully request that this action be concluded and that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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